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No. 90-1156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

A. *Introduction.* The "facial" preemption argument presented for review is so utterly lacking in substance that in order to advance it, petitioner[1] and its *amici* are forced to omit mention of the adverse and virtually dispositive language of the Court in its prior review of this matter, *NOPSI v. Council of New Orleans*, 491 U.S. 350, 109 S.

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[1] Proper names are abbreviated or defined in the same form as that employed in the petition. Petitioner is also referred to as "NOPSI." References to the Council's Order are in the form "R. Order."

Ct. 2506 (1989) ("*NOPSI III*").[2] There, the Court indicated that the Council's Order was not facially preempted, directly or indirectly, by any federal statute, regulation, or decision—including the *MP&L*[3] and *Nantahala*[4] cases, cited by the Court in the forepart of its opinion and upon which petitioner relies.

In *NOPSI III*, petitioner had explicitly embedded its "facial" preemption argument in its challenge to the district court's decision to abstain.[5] (Pet. Br., *NOPSI III*, at 35.) The Court responded that it was unnecessary to determine what result would be appropriate *if* it were confronted with an instance of clear facial preemption, because,

> The Council has *not* sought directly to regulate interstate wholesale rates; *nor* has it questioned the validity of the FERC-prescribed allocation of power within the Grand Gulf system, or the FERC-prescribed wholesale rates; *nor* has it reexamined the prudence of NOPSI's agreement to participate in Grand Gulf 1 in the first place. Rather, the Council maintains that it has examined the prudence of NOPSI's failure, after the risks of nuclear power became apparent, to diversify its supply portfolio, and that finding that failure negligent, it has taken the *normal rate-making step* of making NOPSI's shareholders rather than the ratepayers bear the consequences. *Nothing in this is directly or even indirectly foreclosed by the federal statute, the regulations implementing it, or the case law applying it.*

[2] In fact, the petition barely and only tangentially mentions *NOPSI III*. (*See* Pet. at 3, 7, 8 n.5, 9, 16.)

[3] *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988) ("*MP&L*"), *cited in* 109 S. Ct. at 2509.

[4] *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), *cited in* 109 S. Ct. at 2509.

[5] Petitioner's "Question Presented" in *NOPSI III* was whether abstention was appropriate where "a federal statute and the explicit orders of a federal agency (here FERC) have preempted local regulatory authorities" (Pet. Br., *NOPSI III*, at i). It asserted that the Council's Order was "invalid on its face." (*Id.* at 35.)

109 S. Ct. at 2517 (emphasis added). Continuing, the Court explained that the preemption issue in this case must inevitably be decided by a factual inquiry:

> There may well be reason to doubt the Council's necessary *factual* finding that NOPSI would have saved money had it diversified. See n. 2, *supra*. But we cannot conclusively say it is wrong *without further factual inquiry* . . . .

109 S. Ct. at 2517 (emphasis added). Similarly, the Court viewed NOPSI's so-called "pretext" claim (not presented for review here) as one requiring factual inquiry, as did the Fifth Circuit.[6] Petitioner simply seeks a second review here of an issue presented in *NOPSI III*, using the same arguments.

Further, the petitioner and the FERC's *amicus* brief employ the ruse of confusing those actions taken by the Council with *different* acts, not taken, that would have been preempted—a position also rejected in *NOPSI III*. Virtually all their arguments rely upon confusing: (1) the decisions of *intercompany* consequence to *undertake*, to *construct* and to *complete* the Grand Gulf 1 project, as well as the intercompany *allocation* of costs—all within the

[6] The Court stated that: "Analysis of this pretext claim requires an inquiry into industry practice, wholesale rates, and power availability during the relevant time period, an endeavor that demands some level of industry-specific expertise." *NOPSI III*, 109 S. Ct. at 2515. The Fifth Circuit stated that the claim "cannot succeed in the face of a determination that the stated reasons underlying the Council's order were sufficiently supported by the evidence." (App. at 3A.)

FERC's jurisdiction—*with* (2) the option available to NOPSI to reduce its risks (and protect its ratepayers) through off-system sales of power—an option that was entirely consistent with both the construction of the plant and the FERC's allocations to NOPSI, as noted in *NOPSI III*. The Council addressed *only* such a resale option, in the context of record evidence that petitioner's management had proposed such an option to the Council, but instead, negligently ignored critical information and bypassed the very opportunities for off-system sales that *it* had proposed. (R. Order at 10-11, 164-71.) Given supporting evidence the Council's determination is neither "directly or even indirectly foreclosed by federal" law. *NOPSI III*, 109 S. Ct. at 2517.

Petitioner's key arguments, (1) that *MP&L* established a "*per se*" rule requiring the passing on of all FERC-allocated costs without offset (Pet. at 2); and (2) that the FERC had exclusive jurisdiction over the very matter ruled on by the Council (Pet. at 17)—are irreconcilable with the quoted language of *NOPSI III*. Notably, petitioner claims *no* conflict between the decision below and *NOPSI III*. A distinguished panel of the Fifth Circuit made a conscientious effort to assess NOPSI's arguments in light of the Court's precedents and was keenly aware of what the Council did and did not do, as well as the boundaries drawn between federal and state regulatory action in *Nantahala*, *MP&L* and other cases. (App. 11A-18A.)

Petitioner adverts to state court and FERC cases (not one of which was cited in the two courts below) that deal entirely with other kinds of matters (primarily plant construction) in order to fabricate non-existent conflicts. (*See* Pet. at 13-16.) There is no arguable conflict, *see infra* at 18-19, and the FERC notably does not make a similar contention. Instead, the FERC's brief assists petitioner's effort by making obfuscatory assertions as to its own jurisdiction that cannot withstand examination. *See infra* at 15-17.

The procedural posture here also makes review inappropriate. Petitioner has raised virtually identical preemption challenges in the state and federal courts. Several months after the *NOPSI III* decision, the state trial court ruled that the Order was supported by the record evidence, and that there was no factual *or* facial basis for federal preemption. *NOPSI v. Council of New Orleans*, No. 88-4511, slip op. (La. Civ. Dist. Ct. Nov. 15, 1989).

Were the Court to grant review here, it could likely not proceed to the merits because the prior state court judgment was entitled to full "credit" in the federal courts, 28 U.S.C. § 1738, for the "conclusive" effect specifically accorded to it by Louisiana law, La. Code Civ. Proc. Ann. art. 531, as discussed *infra* at 19-21. Moreover, the state court judgment is on appeal, and it seems inappropriate for the Court now to re-review preemption as a "facial" issue, extracted from evidentiary context, on a duplicative track. NOPSI will shortly be in a position to seek review of its several preemption claims by the Court, and should await their proper development. Indeed, the usual course of review of a state utility regulatory order lies through the state court system, and the *MP&L* and *Nantahala* cases followed just that path.

Finally, this case in its present posture is of limited importance, turning on the application of well-articulated law to its particular facts. The effect of the decision below is merely to allow a state regulator to explore an issue factually, without broad, categorical "facial" preemption prohibitions.

Inasmuch as the petitioner omits or misstates significant portions of the factual record, there is a need to restate certain areas with some particularity, as follows.

B. *The Parties*. The Council is invested by law with "all powers of supervision, regulation and control over any" public utility operating in New Orleans. Section 4-1604, Home Rule Charter. Its regulatory power is rec-

ognized by the Louisiana Constitution of 1974. (R. Order at 1-2.)[7]

NOPSI retails electricity entirely in New Orleans. It is the smallest of the wholly-owned operating subsidiaries of Middle South Utilities, Inc. ("MSU") that provide retail electric service (the others being AP&L, LP&L and MP&L). Middle South Energy ("MSE," since renamed "SERI") is the MSU subsidiary created to own Grand Gulf. NOPSI's legal right to operate and to collect rates rests on the Council's authorizing it to do so. Council Ordinance No. 7068 of 1922.

C. ***The MSU "System".*** The petition misportrays the MSU "system" so as to understate each retail company's operating freedom. The MSU "system" is managed as an electric power pool in that the generating units are centrally dispatched and transmission facilities are interconnected. Further, decisions to build generation plants are based on all the companies' needs. However, each plant has been owned and operated by an individual operating company, except Grand Gulf, owned by MSE. The MSU system agreement requires that each company be individually responsible for meeting its own power needs through plant ownership or contracts for power (NOPSI Exh. 36, Item 1, at 14, § 4.01), and each company has independently bought and sold interests in particular plants. (*See* R. Order at 62-70.) As a result, the retail operating companies do not bear the system's total power or costs either equally or proportionately, and there have been significant cost disparities among the companies—despite the various "system agreements."[8] (R. Order at 68-69.) Petitioner had the

[7] Because the Order cites and catalogues the record evidence on which it relies, it is cited for convenience here as a reference to the evidence.

[8] The "system agreements" allocate responsibility for and "roughly equalize" excess capacity costs, but not the companies' *total* power costs. A company pays principally for the power it generates or buys. (R. Order at 63-71; 93-94.)

highest costs on the "system" for almost 20 years. (*Id.* at 69.)

D. ***Grand Gulf.*** Grand Gulf I, described as "catastrophically uneconomical,"[9] was placed in service in 1985 at a cost exceeding $3.6 billion, nearly six times the original projection.[10] Its origin dates to 1974, when NOPSI and other MSU companies agreed to guarantee its construction costs and to pay for indeterminate amounts of its future output (R. Order at 76-80). For six years, NOPSI did not inform the Council of its commitments. (*Id.* at 95 n.57.)

Certain significant events unfolded as construction of Grand Gulf progressed: *First*, other MSU operating companies, but not NOPSI, diversified their fuel sources through the acquisition of coal-fired generation. (R. Order at 80-83.) *Second*, the companies' projected need for additional generating capacity decreased. (*Id.* at 71-72.) *Third*, nuclear plant construction costs increased relentlessly, driven primarily by safety concerns and regulation. (*Id.* at 83-86; 132-142.)[11] *Fourth*, in March 1979 an accident of unprecedented nature occurred at the Three Mile Island nuclear plant ("TMI"), precipitating a major governmental inquiry and significant additional cost implications. (*Id.* at 87-88; 145-48.)

[9] *Mississippi Indus., Inc. v. FERC*, 808 F.2d 1525, 1528 (D.C. Cir.), *vacated in part*, 822 F.2d 1104 (D.C. Cir.), *cert. denied*, 484 U.S. 985 (1987).

[10] NOPSI's share, if passed through fully and immediately, would have resulted in a 60% increase in retail electric rates. (R. Order at 6-7.) The attendant "severe rate shock effect" threatened economic devastation. (*See* R. Order at 7 n.2; *NOPSI v. Council of New Orleans*, No. 85-3398, slip op. at 5 (E.D. La. Sept. 16, 1985), *aff'd*, 798 F.2d 858 (5th Cir. 1986), *modifying* 782 F.2d 1236, (5th Cir.), *cert. denied*, 481 U.S. 1023 (1987) ("*NOPSI I*")). That serious problem was addressed by a rate "phase-in" plan. (R. Order at 189-190.)

[11] The petition erroneously suggests that cost escalation was limited to "between 1980 and July 1985" (Pet. at 4), but between 1974 and 1979, Grand Gulf's forecasted cost had doubled. R. Order at 84.

Shortly after the TMI incident, with Grand Gulf posing increased risk, NOPSI took several inexplicable actions at odds with its interests. It committed to a 29.8% share of Grand Gulf—more than three times NOPSI's relative size in the system—which the FERC subsequently found to be unreasonably large. (*Id.* at 88-94.) Concurrently, NOPSI agreed that its politically powerful sister company, AP&L, need take no Grand Gulf power. In May 1980, NOPSI for the first time disclosed to the Council its Grand Gulf involvement and sought the Council's approval of an unusual "capacity adjustment clause" that would have authorized an automatic future rate increase for NOPSI's Grand Gulf costs, before their magnitude was actually known. It portrayed this proposal as speeding Grand Gulf "benefits" to the ratepayers (R. Order at 95).

Under critical examination at the Council hearing, NOPSI's president twice testified that NOPSI could sell its Grand Gulf power to other utilities, stating, "NOPSI has the option of selling the capacity and marketing it" (R. Order at 96); and later, "[W]e will have the option of selling . . . our portion of it to some other buyer." (*Id.*) The Council declined to approve the "capacity adjustment" proposal but took no further regulatory action given NOPSI's representations.

E. *The FERC Proceedings.* In 1982, MSE sought FERC approval of, *inter alia*, the MSU companies' allocations of Grand Gulf by filing two proceedings described in the petition at 5. Despite its large commitment, NOPSI did not participate until after the close of evidence; opposition to the allocations was carried entirely by intervenors. (R. Order at 97.) The prudence of the MSU companies' investing in, constructing or completing Grand Gulf was not raised. *MP&L*, 487 U.S. at 375. Further, one of the administrative judges declared that the proceeding would not intrude into state-regulated matters involving the responsibilities of the retail companies and declined to preclude state prudence reviews thereof. *Middle South Energy, Inc.*, FERC No. ER82-616-000, Tr. at 228, 248 (Mar. 14, 1983) (*see* R. Order at 46).

The FERC issued Opinion No. 234 (augmented in Opinion No. 234-A), rejecting the agreed allocations. *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 at 61,655, *aff'd*, 32 FERC ¶ 61,425 (1985). It found that Grand Gulf had been planned jointly and that power planning was sufficiently coordinated so that all nuclear costs should be shared (31 FERC at 61,655-56); but it disclaimed holding that the system companies lacked independence (32 FERC at 61,953), and it held that other generation costs should not be shared. It developed an allocation formula, which reduced NOPSI's 29.8% share to 17% and LP&L's 38.5% share to 14%; allocated a new 36% share to AP&L;[12] and adjusted MP&L's share to 33%. *Id.* at 61,655. Wholesale rates followed from these allocations.

The FERC declined, on jurisdictional grounds, to direct how such costs should be recovered in retail rates (32 FERC at 61,952); did not bar retail-level inquiries (*NOPSI II*, Dist. Ct. slip op. at 7); and acknowledged the Congressionally-protected role of the states in retail rate regulation (32 FERC at 61,951) which, it declared, remained unchanged. (*Id.* at 61,952.)

F. *The Council's Ratemaking Proceedings.* In May 1985, NOPSI applied to the Council for a retail rate increase to reflect its Grand Gulf costs. (R. Order at 14.) The Council set rate proceedings in motion and, pending final determination, granted an interim rate increase and,

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[12] In prior briefs, petitioner has erroneously sought to assimilate AP&L's stance to the Order's determinations regarding NOPSI. AP&L, however, sought to escape any allocation, thus throwing larger allocations onto other MSU companies: and its stance conflicted with the FERC's allocation ruling. The Council's Order, however, had nothing to do with the allocation, but rather contemplated that NOPSI would remain responsible for its share and would have revenues from sales off-system (R. Order at 168).

later, entered into a partial settlement.[13] The prudence inquiry,[14] initiated as part of the proceedings, was conducted in three phases involving an extensive evidentiary record, transmitted to the Council on April 16, 1987. (*Id.*)

G. *The Rate Order and "NOPSI III".* The Council's decision, embodied in a 224 page Order issued February 4, 1988, did not question the FERC's allocation to NOPSI, nor base any remedy on the agreements to build, construct or complete Grand Gulf (R. Order at 10, 109; *NOPSI III*, 109 S. Ct. at 2517); nor did it shift any Grand Gulf costs to ratepayers elsewhere (R. Order at 41-43). Rather, it found, in summary, that NOPSI's management failed to exercise any critical oversight over its obligations; that in 1979-80, the economic prospects of Grand Gulf had become uncertain; that if management had acted responsibly, it would have arranged to resell a portion of NOPSI's share off-system as *it* had suggested; and that instead management publicly dissembled and took no action. In light of testimony that NOPSI should have sold all its share, but

[13] The FERC's recital here that the Council "refused to allow NOPSI to recover its Grand Gulf 1" costs and "denied NOPSI's request for interim rate relief" (FERC Br. at 4 and n.3) is simply erroneous. NOPSI *refused* to seek interim rate relief and sued the Council. The federal district court instead required NOPSI to seek interim relief (and found that the Council was acting in good faith). *NOPSI I*, Dist. Ct. slip op. at 11-12. The Council then granted interim relief and offered more. On March 20, 1986, a partial settlement was reached. Other MSU operating companies also reached settlements elsewhere involving rate deferrals and absorptions. (R. Order at 42 n.31.)

[14] A prudence inquiry involves an examination of a utility's actions to determine whether management acted capably and reasonably under the circumstances prevailing and under decisional standards. (R. Order at 31-41.) The established rule is that shareholders, not ratepayers, bear the costs of bad management. *See Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289 n.1 (1923) (Brandeis, J., concurring). NOPSI sought, unsuccessfully, to block the prudence inquiry. *Middle South Energy, Inc. and NOPSI v. Council of New Orleans*, No. 85-5273 (E.D. La. Dec. 19, 1986), *aff'd*, *NOPSI v. Council of New Orleans*, 833 F.2d 583 (5th Cir. 1987) ("*NOPSI II*").

in moderation, might have retained a 9% share, the Council considered the economic impact of any remedy, and it ultimately assessed NOPSI for a failure to sell about a 3% share.[15] (R. Order at 11-13; App. 8A.)

Suits were then filed in state and federal court. The federal district court abstained, and the Court of Appeals affirmed. In *NOPSI III* the Court found that the need to abstain ended with the issuance of the Order. (109 S. Ct. at 2520.)

H. *The State Court Proceedings*. The state court proceeding comprises three actions: (1) by the Council, seeking, *inter alia*, review of the order,[16] (2) by a citizens' group contesting the Order as too moderate,[17] and (3) by petitioner raising federal preemption and state law claims.[18]

On November 15, 1989, the state court upheld the Order, determining, *inter alia*, that "each of the findings . . . is rationally based and is supported by substantial evidence" (slip op. at 6). Petitioner's appeal therefrom is *sub judice*. *NOPSI v. Council of New Orleans*, No. 90-CA-0420 (La. Ct. App. 4th Cir.). Petitioner's claim that its appeal is "limited" to state law issues (Pet. at 11) is simply in-

[15] The original Fifth Circuit opinion noted that 14% was effectively included in NOPSI's retail rates, but incorrectly described this as equal to "the amount the Council had argued NOPSI should bear in the FERC proceedings." (App. 8A.) The court issued a corrected opinion, lodged with the Clerk of this Court. The petition's suggestion that the Order achieved the result that New Orleans had sought in the FERC proceeding (Pet. at 7) is incorrect.

[16] *Boissiere v. NOPSI*, No. 88-2503 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[17] *Alliance for Affordable Energy, Inc. v. Council of New Orleans*, No. 88-2502 (La. Civ. Dist. Ct. filed Feb. 4, 1988).

[18] *NOPSI v. Council of New Orleans*, No. 88-4511 (La. Civ. Dist. Ct. filed Mar. 7, 1988).

accurate, as its facial preemption claim is presented there.[19] To the extent petitioner has chosen to deemphasize its "facial" claim, it may be because every court, state and federal, that had considered it has held it to be meritless.[20]

REASONS FOR DENYING THE PETITION

1. The Petitioner Simply Misportrays The Facts Here, And Those In Other Cases, As It Did In *NOPSI III*

This is the second time that petitioner has sought to prevail primarily by the expedient of misportraying the prudence Order. The Order did not challenge the agreement for, or the construction[21] of, Grand Gulf, nor the FERC-allocated share of power. Rather it found that NOPSI should have undertaken the very sales that its management proposed. (R. Order at 164-171.) Given such sales, NOPSI's allocation and costs would have remained undisturbed, but there would have been offsetting revenues to reduce rates. (R. Order at 168.) In assessing the Order,

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[19] Appellant's Br. at 42-64, 67; Appellant's Reply Br. at 10-17, 22, *NOPSI v. Council of New Orleans*, No. 90-CA-0420 (La. Ct. App. 4th Cir.).

[20] Petitioner contends that the decision below will act as *res judicata* in the *state* court proceeding (Pet. at 10), which is inverted at best, since the state court proceeding was commenced, and ruled upon the preemption claims, first. *See infra* at 19-21.

[21] It is important to underscore that a decision to complete a plant is *not* the same as a decision by a buyer to retain (or to resell) all of one's right to power from that plant. By simple analogy, an office building may be completed rather than left an incomplete shell on the expectation that it may be economic at some time. (The decision involves weighing the "to-go" costs of completion against those of abandonment.) At the same time, a party obligated to take space in it may sublease all or part of its share, according to its needs. Here, the FERC was concerned with the proper allocation of responsibility for Grand Gulf among the participants; it has *never* asserted any interest in blocking further sales of power by the retail companies.

which comprised part of the record in *NOPSI III*, the Court stated that the actions reflected therein were not "directly or even indirectly foreclosed" by federal law, 109 S. Ct. at 2517, and that its merit depended upon the evidentiary record. *Id.*

Plainly, the types of matters that are within the FERC's jurisdiction--*i.e.*, (1) the allocation of costs among the companies (the focus in *Nantahala*); and (2) the merits of the interstate agreements and decisions to participate in, and to build the plant (the foci in *MP&L*)—were not bases for the Council's action. That the petition ignores these distinctions is illustrated by its claim that the panel below ruled that a state has jurisdiction to determine whether a retail company acted prudently "while construction of the wholesale plant was 'under way' " (Pet. at 2)—thus implying that the state could act on *all* matters during that period—and thus misportraying Judge Higgenbotham's reference to the *time* of the operative events as if it stated the *basis* for the Court's decision. The Fifth Circuit had the Order before it, stated its agreement with this Court's analysis of the Order (App. at 15A), conscientiously examined the Court's precedents in *MP&L*, *Nantahala*, *NOPSI III*, and other cases and correctly applied them to the particular circumstances here.

The petition's contention that the decision here "squarely conflicts" with *MP&L* and *Nantahala* (Pet. at 11) is untenable. *Nantahala* involved a state's attempt to substitute its own interstate *allocation* of power costs for the FERC's in setting local retail rates. 476 U.S. at 968-69. *MP&L* involved a state's much belated attempt to hold a prudence inquiry (and require the return of two years' rates) to determine (1) whether MP&L and the interstate group of utilities "acted reasonably when they constructed Grand Gulf 1," 487 U.S. at 368, and (2) to the end that MP&L might be deemed "obligated to purchase less Grand Gulf power than" the FERC allocated, *id.* at 373, thus invading two areas (construction and allocation) within the FERC's

jurisdiction. This Court and every other court examining this matter have recognized the different concerns addressed by these cases[22] and have concluded, as did the court below, that there is "no merit in NOPSI's facial preemption challenge." App. at 24A.

The petition's assertion of disharmony here with the supposed policy of the Federal Power Act ("FPA")—misstated as that of restraining "uncontrolled" state regulation that would "interfere with broader national interests"— is equally untenable. (Pet. at 12.) The purpose of the FPA was to maintain a *dual* system of regulation. One of Congress' principal concerns was to *protect* state regulation of retail matters at the same time that it created a federal agency to regulate interstate matters—the states having been held lacking in power to do so. *See Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 211 (1964). Thus, Section 201 of the FPA, 16 U.S.C. § 824(a), limits federal regulation "to those matters not subject to regulation by the States," and denies FERC jurisdiction "over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). The final bill:

> [*R*]*emoved every encroachment upon the authority of the States.* The revised bill would impose Federal regulation *only over those matters which cannot effectively be controlled by the States.* The limitation on the Federal Power Commission's jurisdiction . . . has been inserted . . . in an *effort to prevent the expansion of Federal authority over State matters.*

S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935) (emphasis added). The Court has noted:

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[22] App. 16A-18A, 27A; *NOPSI v. Council of New Orleans*, No. 88-4511, slip op. at 5-6.

> The Act . . . had *no purpose or effect to cut down state power.* On the contrary, perhaps its primary purpose was to *aid in making state regulation effective* . . . .

Panhandle Eastern Pipeline Co. v. Public Serv. Comm'n of Indiana, 332 U.S. 507, 517 (1947) (emphasis added).

The legislative history could hardly be more contrary to petitioner's position, and it also affects the preemption analysis. Since Congress did not intend to preempt state utility regulation, but to protect it against encroachment, it is obligatory to conduct a factual "conflict-pre-emption analysis" which,

> must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.

Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515 (1989). The idea that the Court should intervene now to resolve the preemption issue on a "facial" basis is contrary not only to its position in *NOPSI III*, but to the Court's *Northwest Central Pipeline* test as well.

2. The Decision Below Leaves the FERC's Jurisdiction Fully Intact

Hidden beneath the indistinct language of petitioner's complaint that the decision below erroneously failed to grant the FERC exclusive jurisdiction "to determine utility prudence during the construction of a wholesale generating facility" (Pet. at 11-12) lies the issue of *which* utility's prudence and *which* matter petitioner addresses. The Council addressed only NOPSI's prudence as to a power resale matter. Not even the FERC has contended here that it had jurisdiction to determine the matter of NOPSI's negligence for bypassing resale opportunities, but it has been drawn into making obfuscatory claims that make it seem so. It asserts:

1. "[O]nly FERC can properly and fairly resolve . . . how the benefits and burdens . . . should be shared between affiliated companies. . . . " (FERC Br. at 12.) However, the Council's Order does *not* address such sharing of benefits or burdens, but rather leaves the FERC's determination intact, as the Court noted in *NOPSI III*, 109 S. Ct. at 2517.

2. "FERC had jurisdiction to consider the argument that Grand Gulf 1 costs were imprudently incurred and should not be passed through to operating utilities . . . . " (FERC Br. at 12.) However, the Council did *not* determine that NOPSI imprudently incurred any Grand Gulf costs, much less by reason of the intercompany agreements, the construction or the allocation. The Order confined itself instead to NOPSI's neglect of the cost-offsetting transactions it had suggested, as recognized in *NOPSI III*. 109 S. Ct. at 2517.

3. "FERC did consider the prudence issue in determining the appropriate allocation of the capacity and costs of Grand Gulf 1 among the four operating companies" (FERC Br. at 14, n.16.) But even this materially inaccurate claim does not suggest that FERC considered NOPSI's prudence in respect to the off-system sales (nor could it, as noted *infra*). The panel below was clearly aware of what the FERC did and did not do in the area of prudence. (App. at 6A.)

Making similar assertions regarding the Fifth Circuit's jurisdictional findings, the FERC states that the Council "has no jurisdiction to decide that NOPSI imprudently *participated* in the Grand Gulf 1 project" (FERC Br. at 12) and " 'cannot evaluate * * * the prudence of [NOPSI's] *decision to be a party to agreements* to construct and operate Grand Gulf . . . . " (FERC Br. at 15 (emphasis added).) However, this Court noted that the Council simply did *not* act as the FERC describes; it has not "reexamined

the prudence of NOPSI's agreement to participate in Grand Gulf 1." 109 S. Ct. at 2517. *See* App. 15A.

The FERC did not consider the type of matter determined by the Council and deemed it not within "the scope of issues considered in reviewing the rates and terms for the jurisdictional sale of power."[23] It avoided all other state-level issues on jurisdictional grounds. *See Middle South Serv., Inc.*, 30 FERC ¶ 63,030, at 65,151 (1985). Indeed, management's failure to pursue off-system sales could not even have been raised at the FERC, which has jurisdiction to review only an interstate transaction *actually filed* with it for approval. *See* 16 U.S.C. § 824e. Where, as here, the utility negligently *failed* to engage in a transaction, there would be no transaction or rate to file at the FERC to establish its jurisdiction (much less to justify an unprecedented retail inquiry). Were no state-level review possible here, NOPSI would escape regulation entirely.

Finally, NOPSI's contention that certain "subsidiary findings" of the Council are inconsistent with "explicit" FERC determinations (Pet. at 7) is not only erroneous and irrelevant, but was raised previously in *NOPSI III* (although not endorsed by the FERC), where petitioner argued that the Council was "making findings that conflict with the very determinations made by FERC." Pet. Br., *NOPSI III*, at 37. The argument was rejected there, and

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[23] After issuing its opinions, the FERC filed testimony in the Congress stating that it had not in fact considered the individual responsibilities of the MSU operating companies because the proceeding "was not one in which the operating utilities attempted to pass-through the actual costs," and that in such a proceeding, "the *prudence* of a party as the *purchaser* . . . is *not* generally within the scope of the issues considered in reviewing the rates and terms for the jurisdictional *sale* of power." *Powerplant Costs: Hearing Before the Subcomm. on Energy Conservation and Power of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 29, 21 (1986) (statement of Acting Chairman, FERC) (emphasis in original and added).

by all courts since. In making the same argument now, the petition contains a lengthy footnote that misstates and mismatches findings of the Council and the FERC. (Pet. at 7 n.5.) Consideration of these matters requires familiarity with facts underlying the determinations, and the argument can hardly be said to suggest "facial" preemption.

3. There Are No Decisions In Conflict With The Ruling Below

Not *one* of the decisions offered by petitioner is even arguably in conflict with the ruling below (Pet. at 18 n.17). They involve, without exception, FERC determinations as to whether a utility seeking approval of a wholesale rate properly completed or abandoned *construction* of a particular plant, or part of one.[24] One case also involves the propriety of the initial agreement to undertake construction responsibility.[25] The decisions have *nothing* to do with whether a buyer of power—such as petitioner—had the opportunity to sell a portion elsewhere. One remaining case cited as purporting to show that FERC can review a utility's "keeping" or "selling" a plant, merely involved

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[24] *See New England Power Co.*, 8 FERC ¶ 61,054 (1979) (plant cancellation), *aff'd sub nom., NEPCO Municipal Rate Committee v. FERC*, 668 F.2d 1327 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982); *Southern California Edison Co.*, 8 FERC ¶ 61,198 (1979) (plant cancellation), *aff'd sub nom., Anaheim, Riverside et al. v. FERC*, 669 F.2d 799 (D.C. Cir. 1981); *Minnesota Power & Light Co.*, 11 FERC ¶ 61,312 (1980) (retirement of pollution control device); *Northern States Power Co.*, 17 FERC ¶ 61,196 (1981) (plant cancellation), *aff'd sub nom., South Dakota Public Utilities Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982); *New England Power Co.*, 32 FERC ¶ 61,112 (1985) (plant cancellation), *aff'd sub nom., Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986); *Union Electric Co.*, 40 FERC ¶ 61,046 (1987) (plant construction); *New England Power Co.*, 42 FERC ¶ 61,016 (1988) (plant cancellation). *See also Regulation of Electricity Sales-For-Resale and Transmission Service*, FERC Statutes and Regulations, ¶ 35,518 (1985).

[25] *New England Power Co.*, 32 FERC ¶ 61,112 (1985), *aff'd sub nom., Violet v. FERC*, 800 F.2d 280 (1st Cir. 1986).

the determination, as in the cases above, of whether "continued construction" of a plant was proper.[26]

The state court cases on which petitioner relies are even less pertinent. Each merely accepts, as they must and as the Council did, a FERC-established wholesale rate as the basis for retail rates.[27]

4. No Review Should Be Undertaken Here In Light Of The Prior State Court Judgment

Review on the merits here would be curtailed by a state law issue. Section 1738 of 28 U.S.C. requires a federal court to give a prior state court decision "the same full faith and credit" it has "by law or usage in the courts of" the state. The "credit" that Louisiana gives to a *trial* court judgment is that it "shall be conclusive of all" suits between the parties on the same cause of action. La. Code Civ. Proc. Ann. art. 531.[28] Even if two actions proceed, the "first final judgment rendered" becomes "conclusive of all." A "final judgment" is one at trial level "that determines the merits in whole or in part." La. Code Civ. Proc. Ann. art. 1841.

The Fifth Circuit believed that it could proceed with the case because the state court judgment was not definition-

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[26] *Arizona Public Service Co.*, 27 FERC ¶ 61,185, at 61,351 (1984); *Arizona Public Service Co.*, 23 FERC ¶ 61,419 (1983), *summarily aff'g*, 21 FERC ¶ 63,007 (1982).

[27] *Eastern Edison Co. v. Department of Public Utilities*, 446 N.E.2d 684 (Mass. 1983), involved a FERC-determined rate that reflected recoupment of the wholesaler's investment in an abandoned plant; *Northern States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981), involved a FERC-determined rate allocating between two utilities the cost of an abandoned plant; and *Northern States Power Co. v. Minnesota Public Utilities Comm'n*, 344 N.W.2d 374 (1984), *cert. denied*, 467 U.S. 1256 (1984), involved the same issue.

[28] La. Code Civ. Proc. Ann. art. 531 is set forth as an appendix hereto.

ally within La. Civ. Code Ann. art. 3556(31) (App. at 23A.), which defines "thing adjudged" as a matter from which "there can be no appeal". But the section does not purport to detract from the "conclusive" effect given by Article 531. Indeed, the Louisiana court decisions that refer to Section 3556(31) as stating that "res judicata" requires that the appellate process be concluded[29] all involve *completed* appellate processes, and they do not address the effect of a trial court judgment.

Such conclusive effect was reaffirmed during the passage of a new "res judicata" statute, Louisiana R.S. 13:4231, effective January 1, 1991. It provides, *inter alia*, that "a valid and final judgment is conclusive between the same parties, except on appeal or other direct review." The official comment makes clear that the *prior* law gave *conclusive* effect to a trial court judgment[30]:

> The use of the phrase "final judgment" also means that the preclusive effect of a judgment attaches once a final judgment has been signed by the trial court. . . . [This] is *in accord with our present law* on lis pendens, see Code of Civil Procedure Articles 531, 532.[31]

[29] *McConnell v. Travelers Indemnity Co.*, 346 F.2d 219, 223 (5th Cir. 1965); *Ward v. Pennington*, 523 So.2d 1286, 1290 (La. 1988); *Mente & Co. v. Anciens Etablissements Verdier-Dufour & Cie.*, 149 So. 492, 493 (La. 1933); *Hospital Corp. of America v. Robinson*, 506 So.2d 938, 940 (La. App. 1987); *Coleman v. Comm'n on Ethics for Public Employees*, 439 So.2d 451, 453 (La. App. 1983); *Thomas v. Dept. of Corrections*, 430 So.2d 1153, 1155 (La. App.), *cert. denied*, 435 So.2d 432 and 438 So.2d 566 (La. 1983).

[30] This effectively leaves the case in a condition discussed during oral argument of *NOPSI III*, Transcript pp. 24-25:

> SOLICITOR: If the state court beat the federal court to the issue, then we might have a res judicata problem . . . .
>
> THE COURT: A rather severe one, wouldn't we?

La. R.S. Ann. 13:4231, Comment (d) (West 1991 Supp.) (emphasis added). Thus, 28 U.S.C. § 1738 requires that the Louisiana judgment receive preclusive effect here.[32]

5. There Is No Significant Issue Meriting Review.

The Court has already given guidance here in *NOPSI III* and will have the further opportunity for review after the case is fully developed. There is no conflict between courts, nor variance from the path outlined by this Court. The case will turn on its particular facts. Thus, assertions that the case has broad implications elsewhere are, at best, uninformed. Further, the evidence here shows a utility management that was indifferent to its responsibilities and that ignored the very opportunities that it had proposed. Any effect of the Order on other utilities will be only to encourage them to pursue available options conscientiously to determine their merit, and this is hardly a cause for concern. The effect of the decision below is only to allow state regulators to explore such a matter factually and within jurisdictional bounds, without broad, categorical "facial" preemption prohibitions.

Moreover, the issue of nuclear plant cost excesses and pass-throughs is largely disappearing. Most plants are complete (112 plants are completed, and only 3 remain scheduled for completion[33]). Petitioner's claim here, that it could sit on its hands, not take protective steps, not test the

[31] The majority rule in state and federal courts is that a judgment operates preclusively regardless of whether it is pending appeal. Wright & Miller, 18 Federal Practice and Procedure § 4433, at 308.

[32] Below, NOPSI erroneously contended that actions pending in federal courts were governed by a different statute, La. Code Civ. Proc. Ann. art. 532. That Section applies only when a prior *federal* action requires the state to stay its hand.

[33] Nuclear Regulatory Commission, Information Digest at 17 (1990).

market, and then escape with impunity, is and should be, of historical interest only.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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March 25, 1991

APPENDIX

APPENDIX

LOUISIANA STATUTES

La. Code Civ. Proc. Ann. art. 531 (West 1960):

> When two or more suits are pending in a Louisiana court or courts on the same cause of action, between the same parties in the same capacities, and having the same object, the defendant may have all but the first suit dismissed by excepting thereto as provided in Aticle 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.

Article 531 was amended effective January 1, 1991, in a manner not relevant here, as follows:

La. Code Civ. Proc. Ann. art. 531 (West Supp. 1991):

> When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto as provided in Article 925. When the defendant does not so except, the plaintiff may continue the prosecution of any of the suits, but the first final judgment rendered shall be conclusive of all.